

95-59

# WOODBURN VILLAGE

Condominium Unit Owners Association

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Annandale, Virginia 22003  
(703) 698-1050

May 2, 1996

Office of the Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Washington, D.C. 20554

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MAY 3 1996  
FEDERAL COMMUNICATIONS COMMISSION

Re: Proposed regulation - FCC 96-151

Ladies and Gentlemen:

On behalf of the Board of Directors (the "Board") of Woodburn Village Condominium Unit Owners Association (the "Association")<sup>1</sup>, I want to thank the Federal Communications Commission (the "Commission") for the opportunity to submit comments on a proposed regulation published at 61 Fed. Reg. 16890 (April 18, 1996). In addition, this letter supplements the comments submitted in a letter dated April 10, 1996, with respect to regulations proposed at 61 Fed. Reg. 10710 (March 15, 1996). At the Board's regular monthly meeting on May 1, 1996, I was asked to comment on the proposed regulation on behalf of the Board.

In particular, and for the following reasons, it is requested that the regulation being proposed under §207 of the Telecommunications Act of 1996 (the "statute") be withdrawn, reconsidered and repropose. It is the writer's belief that the proposed regulation is contrary to (1) the Administrative Procedure Act as amended, (2) the Congressional intent in enacting the statute, (3) the Internal Revenue Code and (4) the Code of Virginia.

Section 207 of the statute contains the following:

...[to] promulgate regulations to prohibit restrictions that impair a viewer's ability to receive video programming services through devices designed for over-the-air reception of television broadcast signals, multichannel distribution service, or direct broadcast satellite services.

The legislative history of the statute shows that the Senate conferees receded to the House conferees with respect to many aspects of the statute. However, this was not the case with respect to §207 of the statute.<sup>2</sup> In fact, there was no parallel provision in the Senate bill. In addition, the proposed rule on broadcast antennae assumes that the Board is not concerned with the health or safety of the residents of the Association. Further, a practical effect of this proposed regulation on the Association, given its location next to Fairfax Hospital (the largest hospital in the metropolitan Washington area), is the necessity of adding towers of extreme heights.

Furthermore, it is interesting to note that the proposed per se rule set forth in the NOTICE OF PROPOSED RULEMAKING relies on the implementation of an earlier proposed rule. Section 241(b) of the Small Business Regulatory Enforcement Fairness Act of 1996, Pub.L. 104-121 (the "Act"), requires that on and after March 29, 1996, all new temporary and final rules must be submitted to (1) the General Accounting Office, (2) the Speaker of the U.S. House of Representatives (the "House"), (3) the President of the U.S. Senate (the "Senate"), and (4) the chairmen and ranking minority members

<sup>1</sup>The Association consists of 606 units in 43 buildings located in Annandale, Virginia.

<sup>2</sup>H.R. Rep. No. 104-458, 104th Cong. 2d Sess. 166 (1996)

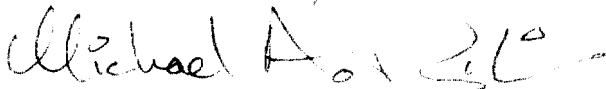
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of the committees of the House and the Senate that have jurisdiction over the enabling legislation under which the rule is being promulgated. A statement at 142 CONG. REC. S3683, S3685 (April 18, 1996), inserted by Senator Nickles on behalf of Senator Stevens, Senator Reid and himself, provides that any major rule promulgated under the statute is exempt from the Act. That provision states in part that "... such an issuance would fall within the definition of "rule" and would be subject to the requirements of the legislation for nonmajor rules."

The proposed regulation and the earlier cited proposed regulation specifically refer to homeowners' associations. The words "person" and "corporation" are defined at 47 U.S.C. § 153(i) and (j). The term "person" includes an individual, a partnership an association, a joint stock company or a corporation, while the term "corporation" includes an association. However, it is not clear whether a homeowners' association meets either of these definitions. However, the term homeowners' association is defined at § 528(c) of the Internal Revenue Code and the regulations promulgated thereunder. Under those provisions a condominium association is not a homeowners' association unless it elects to be taxed under § 528. However, the proposed regulations are applied to all condominium associations regardless of their elections (or the lack thereof). If the Board were to make such an election, the Association's federal income tax liability for the most recent fiscal year would almost double.

Pursuant to the Code of Virginia, the Supreme Court of Virginia has held that a condominium restriction or limitation reasonably related to a legitimate purpose does not inherently violate a fundamental right and may be enforced if it serves a legitimate purpose and is reasonably applied.<sup>3</sup> The proposed rule would reverse this decision (at least on a prospective basis) and may be construed as obviating the regulatory authority and the police power of the state. Accordingly, it is requested that the proposed rule be withdrawn, reconsidered and repropose to, at a minimum, specifically exclude a condominium.

Respectfully submitted,



Michael A. Rubin  
Treasurer, Board of Directors

Enclosures (5 copies)

cc: Randi Albert  
Cable Services Bureau  
2033 M Street, NW  
Washington, D.C. 20554

Kathleen S. Wilson  
President, Board of Directors

Public Affairs Department  
Community Associations Institute

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<sup>3</sup>Unit Owners Association of Buildamerica-1 v. Gillman, 223 Va. 752, 292 S.E.2d 378 (1982)